Supreme Court, U.S.
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No. 99-2038

In the
SUPREME COURT OF THE UNITED STATES

NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISERS, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY TO OPPOSITION OF FEDERAL RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 the Corporate Disclosure Statement was filed June 20, 2000, with the Petition for Writ of Certiorari.

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Argument

1. The Federal Respondents concede that the Commission's interpretation below enlarges the statutory exemption from Title VI's local franchising requirement in Section 602(7)(B), but they invite the Court to ignore the Commission's enlargement as only "a minor extension." At page 10 of their brief in opposition they say:

> The Commission's exemption of ECI from local franchising represented a minor extension of existing franchise exemptions in response to a newly created system for video programming distribution.

But the exemptions in Section 602(7) are, after all, statutory, and the agency lacks the discretion to narrow the statute's applicability in the absence of a forbearance provision analogous to that in Section 10 (Competition in Provision of Telecommunications Service), 47 U.S.C. § 160, which applies only to telecommunications carriers and services and does not apply to cable service. Moreover, the Commission's attempt below to exempt such systems stands on less solid ground than even its attempted forbearance – which this Court rejected in *MCI* v. *AT&T,* 512 U.S. 218, 231-32 (1994) -- exempting carriers from the so-called filed-rate doctrine, prior to the enactment of Section 10. Here the rôle that the purported cable exemption would play has significant implications for inter-governmental jurisdiction beyond the scope of the Commission's own regulatory jurisdiction. As

petitioners point out in their petition at 3, one of Congress' overriding concerns in enacting the Cable Act was

> to ... provide and delineate within Federal legislation the authority of Federal, state and local governments to regulate cable systems.

H.Rpt. 98-934 to accompany H.R. 4103 (The Cable Franchise Policy and Communications Act of 1984) at 22 (1984); *see also id.* at 22; Section 601 (Purpose), 47 U.S.C. § 521, particularly subsections (1) and (3), printed in Pet. App. at A111. This case is not simply one of an agency's renouncing its own statutory jurisdiction on the margin; for the effect of the construction below is to tinker with Congress' purposeful legislative delineation of the authority of "state and local governments to regulate cable systems." H.Rpt. 98-934, *supra.*

Exemption of these small cable systems was a policy function that Congress did not delegate to the agency but rather embodied in the inter-governmental "delineation" in the statute itself. The absence of any delegation at all to the agency of exemptive authority precludes the implication of any delegation to the agency of authority to exempt cable operators from the local-franchise requirement in Section 621(b). Particularly is this so where Congress expressly negated any implication of the grant of pre-emptive power. *See* Sections 636 of the Cable Act and Section 601(c) of the Telecommunications Act of 1996, discussed below at **6**.

For the courts to accord the Commission a delineative rôle would contradict Congress' expressed intent for the Act "to ... provide and delineate *within Federal legislation* ... the respective authority of Federal, state and local governments to regulate cable systems." H.Rpt. 98-934 at 22 (emphasis supplied). The Commission majority recognized at the time that it was balancing "important issues surrounding dual federal-local jurisdiction under the Communications Act", but it justified its disregard of Congress' specific language as advancing its own "commitment to ensure competitive opportunity while safeguarding the discretion and responsibilities of local officials." Pet. App. at A94. Under the statutory scheme it was not within the Commission's prerogative to balance its commitment to its own competitive policies against the statutory, inter-governmental allocation of regulatory responsibility by Congress. A general competitive policy simply does not override specific statutory provisions. *Medtronic* v. *Lohr*, 518 U.S. 470, 485 (1996); *Cipollone* v. *Liggett Group*, 505 U.S. 504, 517 (1992).

The Court should not accept the government's invitation here to overlook the "minor extension" as insignificant. The commissioners themselves recognized below that the agency's "minor" extension is of major significance. As Commissioner Tristani points out in her dissent

> [T]oday's decision poses a substantial risk of unintended consequences.... I see no legal basis for limiting the decision solely to entities that want to serve MDUs. If

> ECI's system is not a "cable system," it would not be a cable system whether it serves MDUs or single family homes. The next case before us could be an overbuild of an entire cable franchise area that would look exactly like a cable system in every respect – except that no Title VI obligations would apply.
>
> [T]elephone companies, incumbent cable operators and others have already expressed an interest in obtaining similar treatment if ECI's petition is granted. We should not underestimate the incentive that today's decision gives companies to artificially restructure their ownership arrangements to evade Title VI regulation.

Pet. App. at A107. The majority's opinion essentially concedes the potential danger, admitting that "In granting ECI's motion for a declaratory ruling, we are cognizant that other similarly-situated operators have embraced the same interpretation as ECI." Pet. App. at A91. It is "cognizant" that its decision would exempt ECI from compliance "with all of a cable operator's statutory obligations" under Title VI. Pet. App. at A29. It bravely asserts, however, that "the instant decision is expressly limited to the facts before the Commission...." It then identifies seven such facts, the first of which is "absolute separation of ownership" between the cable operator and the common carrier providing the video transport "and ... nothing more than the carrier-user relationship between them". Pet. App. at A91.

The inefficacy of the "purple cow" limitations the Commission thought necessary in paragraph 73 is demonstrated by the fact that a U.S. District Judge one month later applied the Commission's "minor extension" to a case in Austin, Texas, whose population exceeds a half million, where the cable operator and the carrier were sister subsidiaries of Southwestern Bell Corporation. *See City of Austin* v. *SWBV,* 1998 U.S. Dist. LEXIS 16332, 16333 (W.D. Tex. 1998), *aff'd,* 193 F.3d 309 (5th Cir. 1999), *cert. denied,* 120 U.S. 1708 (2000). Southwestern Bell is now the second largest telephone company in the country, operating in more than two dozen states. The federal respondents' formulation of the question presented implies that the regulation of only a twelve-building cable system in Michigan is at stake. Br. at 1. But as a result of the structure of Title VI, which regulates only cable operators as defined, the district judge's decision would seem to give any cable subsidiary of Southwestern Bell – or any other telephone company – anywhere in the country a means to evade the consumer-protection and other regulatory provisions of Title VI. These are the very "significant additional consequences" that the Commission majority acknowledged in paragraphs 3 and 4 of the Commission's order (Pet. App. at A29) and found important enough to attempt to forestall – unsuccessfully as it turns out – by the "purple cow" limitations in paragraph 73 of the order. *Id.* at A91. As a result, such operators are no longer obligated "to comply with ... a cable operator's statutory obligations." *Id.* at A29.

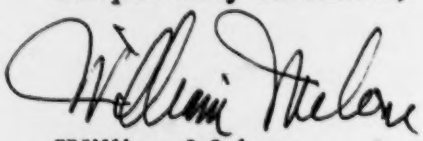
2. This case presents a more subtle *Chevron* issue than that addressed under Point 3 of the government's brief at 12-13 and 15-16, because here both the federal and state agencies were assigned administrative responsibilities by Congress. *See* Point III of the petition at 24-28. In the 1984 Act Congress "continued to rely on local franchising as the *primary* means of regulation." *Time-Warner Entertainment Co.* v. *FCC*, 320 U.S.App.D.C. 294, 300, 93 F.3d 957, 963 (1996) (*per curiam*) (emphasis supplied), *citing* H. Rpt. 98-934 at 19 (1984). Congress cannot reasonably be understood to have given the FCC, as the "secondary" regulator, any discretion over the "primary" regulatory responsibilities of the local governments. For this reason, the instant case was not an appropriate case for the court below to accord judicial deference to an aliteral agency interpretation of the statute, which interpretation moreover violated the express limitations on agency pre-emption in Sections 636 of the Cable Act (Coordination of Federal, State, and Local Authority), 47 U.S.C. § 556, and Section 601(c) (Federal, State, and Local Law) of the 1996 Act, 47 U.S.C. § 152 nt. Unlike Section 224 of the Communications Act, 47 U.S.C. § 224, which gives the Commission jurisdiction over the attachment of cable lines to utility poles in default of the exercise of state jurisdiction, here only the non-federal jurisdictions can issue franchises that satisfy the requirement in Section 621(b) of the Cable Act. The FCC cannot issue local franchises, and it cannot relieve the operators of that statutory requirement by forbearance. Yet that is the effect of its interpretation

of a provision that Congress gave it no power to administer and an implied pre-emptive effect that Congress expressly withheld.

Conclusion

The gaping hole that the Commission's "minor extension" leaves in Title VI's comprehensive plan for inter-governmental regulation in the interest of cable subscribers urgently warrants review by this Court of the decisions below.

Respectfully submitted,



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